Central Law Journal.

ST. LOUIS, MO., SEPTEMBER 24, 1920.

"IT IS NOT SUFFICIENT TO RELY UPON THE STATES."

Some years ago the writer warned the members of the National Credit Men's Association, composed of the ablest men in American commerce, then sitting in annual session at Pittsburg, that he "ventured to predict that States Rights will be gradually absorbed unless the State Legislatures suitably accommodate their local laws to the manifest needs of interstate commerce." That "the preservation of state autonomy means the guarantee of the true liberty against certain difficulties and a possible oppression from centralized power."

That prediction has been vindicated by the Supreme Court of the United States (Missouri v. Holland, 40 Sup. Ct. Rep. 382), and in much shorter time than was justified by the deepest apprehension. The Court passed favorably upon the "Migratory Bird Act," with the merits of which we are not now concerned, for it is an assault upon a sacred principle to which attention is directed. The possibility of the failure of the states to act was thoughtfully drawn squarely before the Court as an argument in support of its view, and for that reason is thereby emphasized. Said the Court:

"But for the treaty and the statute, there soon might be no birds for any powers to deal with. *We see nothing in the Constitution that compels the government to sit* by while a food supply is cut off and the protectors of our forests and of our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain * * *."

It is not now proposed to point to the ruthless violation of the Tenth Amendment to the Constitution and the sacred assurance of its proposers, that the powers not specifically delegated were expressly reserved to the states. We shall speak of that at another time, remarking, however, that it can be incontrovertibly established that the Constitution would have failed of adoption but for the assurance contained in the Tenth Amendment —and that it should have failed.

Our present object is to endeavor once more to awake an interest in the Tenth Amendment and thereby arouse the states from a lethargy that threatens to permit the undermining of the Federal Government through the destruction of the compromise spirit that animated it. To do this it is not necessary to contend against the Hamiltonian doctrine of centralization of power nor the Patrick Henry demand of no power at all at Washington. Let us instead follow the reasoning of the noble, unselfish and beloved Madison, who sacrificed a treasured friendship with the Father of his Country because of the latter's leaning to Hamilton and who earned the personal and political antagonism of Patrick Henry because of a desire to give that strength to the Federal Government necessary to maintain it.

Amongst the law editors, no man has endeavored more earnestly and more intelligently to sound the warning of the inevitable danger lurking in the ignoring of the Tenth Amendment than has Judge R. T. W. Duke of the Virginia Law Register. Living as he does under the shadow of Monticello and hard by the tombs of Madison and Monroe, one could visualize him communing with the spirits of the founders; of listening to their words of warning and wisdom; and pointing ever to their own watchfulness in preserving to the states those powers that would forever prevent an empire in North America. It is most sincerely to be desired and needed that the spirit animating this life-long editor should pervade the entire editorial fraternity that there may go forth to the judges and lawyers

and laymen of America an irresistible call to arms.

The Tenth Amendment has stood like a Gibraltar against the wind-puffs of the expediencies of politicians and the hurricane assaults of ruthless ambition, but it cannot withstand the acid attacks of the Supreme Court eating away its foundation. It has stood these hundred years and much more, as a great protecting wall, shielding an infant republic as it has grown into strength. Who will answer for the consequences of its destruction; who can predict the end? Let him who would try familiarize himself with the debates and correspondence of the Fathers between the years 1776 and 1790. He need read no more.

THOMAS W. SHELTON.

DOES THE FACT THAT ONE JUROR IS AN ALIEN AFFECT THE VERDICT?—Our attention has just been called to a *nisi prius* decision of the Court of Quarter Sessions of Allegheny County involving the question of the effect upon a verdict in a criminal case of the fact, unknown to either the State or the defendant, that one of the jurors was an alien. It was held, in that case, that an affidavit presented to that effect after a verdict of guilty was not a ground for a new trial. Commonwealth v. Dombek, 68 Pitts. Leg. Jour. 231. In explaining the view of the Court on this interesting question Judge Carpenter, who spoke for the Court en banc, said:

"It may be conceded that if the fact of alienage had been known to defendant or to either counsel, the proposed juror would have been excused, or challenged for cause. But he was examined on his *voir dire* and accepted, and before being sworn as a juror was asked by the Clerk if he was a citizen of the United States and whether he was of kin to the prisoner at the bar. To the first question he answered 'Yes;' to the second, 'No.' That he failed to differentiate, or that he assumed that 'citizen' and 'resident' are synonymous, is evident. There is no suggestion that he intentionally gave an untrue answer, and nothing appears tending to impeach his intellectual capacity, his integrity or his impartiality. We are, therefore, brought face to face with and must answer, the concrete question—Does the fact that one of the jurors was an alien, that fact being unknown to the defendant, or to either counsel, until after the verdict was recorded, make it our legal duty to grant a new trial?

"We have called attention to the statutes relating to the selection of jurors. This brings before us the question, Does the Commonwealth, by directing that jurors be selected from the 'whole qualified electors' assume the duty of selecting only qualified electors for jury service? Does the law create a legal presumption that all jurors selected are qualified electors? Or, to put the question another way, Does the statute relieve the defendant from the consequences of failure to exercise his right to challenge? We are of opinion that these questions must be answered in the negative."

At the early common law, both in England and America, as shown in the early case of State v. Groome, 10 Iowa 308, it was the duty of the State to see that there were twelve competent jurors selected and that it was not defendant's duty by preliminary examination or investigation to assure himself of this right. In Queen v. Mellor, L. J., 1858, Vol. 27, N. S., C. L. 121, the English Court of Criminal Appeal decided by a vote of eight to six to affirm a judgment on a verdict of guilty where one of the jurors was not the person actually called and accepted. The modern rule as stated in State v. Pickel, 103 Iowa 714, is that the competency of jurors is a matter of challenge only and that if one who has no right to sit on a jury nevertheless is accepted by the State and the defendant, although either or both may be ignorant of his disqualification, that fact will not affect the verdict subsequently rendered in the case.

ADMISSIBILITY OF EVIDENCE SECURED BY INDUCEMENT OF GOVERNMENT OFFICERS.—Many decisions by lower federal and state courts have been to the effect that no conviction would be allowed on evidence of wrongdoing brought about by the inducement or connivance of government officers. These decisions fail to make a distinction between an act that incites a crime and one which merely offers an opportunity for its commission. In the first place the alleged wrongdoer is given an incentive to commit the crime which he did not have before. His passions or cupidity are aroused by the act of the officers and thus the officer compels him to do that which he otherwise would not have done.

This distinction is well illustrated by the recent case of Fiunkin v. United States, 265 Fed. 1, where the Circuit Court of Appeals (9th

Cir.) held that the fact that government officers furnished marked money, with which morphine and cocaine were bought under their directions, did not bar a prosecution for the sale of such drugs without payment of the tax thereon, since they did not incite or entrap defendant to commit the offense, having had nothing to do with defendant's possession of the drugs or willingness to sell them.

In the course of an interesting opinion the court said:

"It is argued that the defendant was induced through the machinations and instigation of the government officers to commit the offense, or, in other words, that he was entrapped by such contrivance of the officers to do the thing which the law condemns. The evidence fails to show, however, that such was the case. The officers had nothing to do with the defendant's having the drugs in his possession. They had nothing to do with his willingness to sell the same for a consideration. They had nothing to do whatever with the conditions that prevailed prior to the time they sent the addict to the store to make the purchase, nor with the defendant's state of mind or purpose of action, should opportunity present itself, of dealing with the drug as a commodity for sale to those who were willing to buy. Nor did they offer any inducement to the defendant to sell, except that they did, through Collins, offer to buy, and proffered the amount of money that defendant fixed as the price he was willing to take. Nothing beyond this appears in the testimony. It is true that the defendant was entrapped by what was done to sell the drug to the government officers, and to put himself in a position of yielding up evidence of his commission of the offense. But this does not signify that the government officers lured him, or incited or induced him, to do what he would not otherwise have done, if any other addict had applied to him to purchase the drug."

The same rule has been announced by the Supreme Court of the United States where the Supreme Court of the United States where decoy letters were sent through the mails to ascertain whether parties are indulging in unlawful practices. Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, is a case where such a decoy letter was sent through the mail under an assumed name, and was answered, also through the mail, giving the information requested. Defendant was indicted for unlawful use of the mails in giving the information, and the court held him guilty of the offense, notwithstanding the officers of the government thus participated in inducing him to write and post the offending letter. Other authorities are to the same purpose. Goode v. United States, 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297; Andrews v. United States, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023.

HAS THE LAWYER LOST CASTE?

The Central Law Journal in its issue of July 30th discussed editorially the question—"Is the Legal Profession Losing Its Influence in the Community?" in which you arrive at the conclusion that the profession on the average is as influential as it ever was.

I wish to add to your argument some ideas which I expressed in an address to the El Paso County Bar Association at Colorado Springs, Colo., January 20, 1917, and to express my disagreement with those in and out of the profession who assume that the members of the profession, individually, have a less estate in the regard of the community than they had fifty or one hundred years ago, or more, or that the profession, as a whole, has declined in the public regard.

I propose to show that this complaint, that lawyers have been reduced in rank, is a part of the psychology, which, in every era, induces men to think some other time, not their own, the golden age. I undertake to say, that, leaving out of consideration the element and influence of wealth, neither the members of any other profession, nor those following any other occupation, exercise an influence, in the affairs of this people, equal to that exercised by the members of the bar. Members of the legal profession preponderate in public life, and this very predominance brings down upon us attacks from less fortunate professions and arouses the jealousy, which always accompanies consciousness of inferiority.

Lawyers have been considered, in all ages, fit subject for the jest of the wit and the gibe of the wicked; the shafts of every cynical pretender have been winged toward them. They have always been a shining mark for the sarcasm of the iconoclast, the satire of the misanthrope and the sneers of the vulgar. We do not know when Ecclesiastes was written, but the book, of which it is a part, probably antedates all

other authorities commonly quoted in our arguments and cited in our briefs; we are accustomed to look upon that book as a very fountain of wisdom. Let me quote:

"Say not thou, What is the cause that the former days were better than these? for thou dost not enquire wisely concerning this."—Ecclesiastes, 7-10.

The account, given by Saint Luke, of certain interviews between Jesus and the lawyers, does not indicate that all of the profession were well thought of by all the people, even as long ago as Christ's time. In the face of that indictment, which according to the disciple, and which must be taken as true, the lawyers of that day did not deserve to be followed as the accepted leaders of men.

A waggish follower of Jack Cade said: "The first thing we do, let's kill all the lawyers," and he met with a ready assent from the motley followers of that distinguished prototype of our modern reformers, as ready as could be expected from any assemblage of the rabble today. This indicates that there were people, at that time, who were not unanimously possessed of the good will towards us which is now attributed.

Ben Jonson, Robert Burton and Charles Macklin; John Gay and Oliver Goldsmith; Junius, Colton and Percival, writers fairly representative of the two centuries before the last, each took his several fling at law and the lawyers. This quotation from Burton's "Anatomy of Melancholy:"

"Our wrangling lawyers * * * are so litigious and busy here on earth, that I think they will plead their clients' causes hereafter—some of them in *Hell*."

Old Sam Butler's "Hudibras" (1663) devotes so many swinging lines and jingling rhymes to lawyers, that it is difficult to select the ones which best show his poor opinion, but these will suffice:

"Your pettifoggers damn their souls,
To share with knaves in cheating fools."

A reference by Daniel Webster to "the mean, money-catching abominable practices which cover with disgrace some of the modern practitioners of law," shows that the ills which afflict our day were not unknown in his.

We have scalawags and scoundrels in the profession now, but we had them when Warren wrote "Ten Thousand a Year," more than three-quarters of a century ago; the reputation of the profession, as a whole, does suffer because Quirk, Gammon and Snap are still in it and Jaggers still invites to crime, but, evidently, similar conditions have existed in all times and all countries, which have known lawyers as a profession.

Voltaire is reported to have said:

"I never was ruined but twice—once when I gained a lawsuit—and once when I lost one."

It is indeed true that in all the times and all the countries referred to, those who jested and those who gibed, those who satirized and those who sneered, well realized that ours is the only profession which is able to safely guide the private fortune of the individual or the Ship of State.

It is not true that either the character or standing of the profession, as a whole, has shrunk. In a time when ignorance predominated among the masses, the members of the learned professions, medicine, law and the clergy, stood out as belonging to a higher caste, and the members of these professions held, relatively, a different position in the community from that held by them now.

The general diffusion of knowledge among the people has rendered the learning of the lawyer less singular; in an age when the higher learning is within the reach of every citizen, when every community supports a high school, when, at almost every crossroads logarithms are expounded and dead languages translated, when every State supports a university, and every considerable community has its own college; in an age when the advancement of the arts

and sciences has harnessed unknown forces to the chariot of civilization, it is to be expected, it is necessary, that there shall be learned men besides lawyers and doctors and ministers, and learned professions, other than the professions so denominated one hundred years ago.

The great prosperity, resultant upon the development of a virgin land, has produced such fruitfulness of riches that those who are the clients now are often as well, and sometimes better, educated than the lawyer. It frequently happens, in these days, that "mere tradesmen" have university educations—something formerly reserved for the nobility, the gentry and those destined for the learned professions.

Terms of money, possibly, have become more generally accepted as the standard by which to measure the success and the ability of men, but the millionaire has eclipsed the lawyer of standing nowhere, except in the meetings of the money changers and in the salons of the merely rich. Neither in the public life to which I have referred, nor in the communal interests and activities in which men more generally participate has the lamp of the lawyer, when lighted by learning and integrity, been made dim by the glare of the plutocratic headlight.

There is a story of a great Irish lawyer who had a brother, less distinguished, also a member of the profession. The latter being asked for the secret of his brother's success with juries answered:

"Well, sor, first he butthers them up and then he slathers them down."

I have "butthered the reader up" so far; I think I shall now follow the case cited, and "slather him down."

Lawyers have faults! Yes, much as you may be surprised to hear me say it, they have faults! When you take the profession as a mass, when you get them assembled in public meeting, for instance, they are so apt to cease to be lawyers and become mere men. So many of them have political ambitions, latent or rampant, and are cowed by the real or supposed view of the general public; so many are afraid of offending their clients; then very many of them are afraid of the judges—little judges and big judges, state judges and federal judges, and courts of all degrees, from the J. P. to the S. C., there never seems to be obtainable that unity of action, on public questions, which counts so much in the scale of influence. There is, of course, a reason, creditable to our profession, why this is so. Curiously enough, the higher you climb on the intellectual ladder, the less likely you are to obtain a uniform view. Lawyers, who are accustomed to think logically and to arrive at conclusions through the reasoning faculties, who, starting from a common point, constantly reach opposite poles by the same mental processes, cannot be expected to arrive so readily at a unanimity of view as a body of business men who have merely the rise and fall of prices to consider, or to follow a leader like a lot of laborers, whose class spirit is appealed to, and becomes the mainspring of their action. Notwithstanding this, I think the lawyers of the country should have taken a stand, as lawyers, on many of the agitations for radical changes in the charters of our liberties and our whole sociological structure, which have been going on for the last twenty-five years and are still in progress. It may not be expected that we should pronounce, as a profession, on Votes for Women, Prohibition, Eugenics, or Birth Control, but we should have expressed clear-cut opinions for or against the Initiative, the Referendum, and the Recall, including: (a) of officials generally; (b) of judges; (c) of judicial decisions.

We did go so far as to condemn the recall of judges, but either failed to realize, or lacked courage to declare, that the same reasons, which can be urged against the recall of judges apply, with equal force, to the recall of any other official. I should

regret to believe that the psychology of mind which impelled the profession to single out the recall of judges was a desire, even if sub-conscious only, to exalt the judges to the public, and thereby exalt themselves to the judges. I do not think a very courageous stand was taken in Colorado over the recall of decisions; true the statute permitting it is a dead letter so far, but it is an infernal machine which may be wound up and set to go off at any time and blow up our whole social system!

We, as lawyers, confine *our* Initiative and *our* Referendum largely to matters of practice. In none of the great movements involving fundamental questions of life and liberty, which have so profoundly stirred our people for the last three-quarters of a century, have we been originators or leaders. We were as complaisant toward slavery and slave-owners as were the clergy; we saw Dred Scott sent back to servitude because it was the law, and we made no effort to change the law, and John Brown's soul went marching on without any accelerating push from the members of the legal profession. Could you get a lawyer's convention, local, state. or national, to declare whether the white slave act should be limited to professional vice or should include occasional and accidental immoralities? Will the profession, as a body, through its official organizations, take a stand against the subversion of fundamental liberties which will inevitably result from proposed engraftments on present sumptuary legislation? Will it fearlessly proclaim that toleration of *ex post facto* laws on one subject, will certainly lead to the enactment and upholding of the same kind of laws on other subjects? Will it boldly point out that the weakening of the guarantees against search and seizure tends to undermine one of the most sacred foundations upon which free government is builded and sets a precedent for future tyrants to use against human liberty? I regret to say that when it comes to questions of this kind we are often moral cowards, whether on or off the bench.

The aspiration for a higher place in public confidence and public esteem must be turned into an aspiration to accomplish greater public good and render greater public service; whether what we wish for is something to be gained or regained, the accomplishment must depend on courage. Shall we lag or lead? Shall we point out the dangers as they are disclosed and apply the remedies as they are called for, or shall we devote our attention to fee-taking and the forms of writs? Shall we be guardians of the temple of Liberty, protecting it from all insidious hostile approaches, or shall we be mere alms-seekers upon the steps?

T. J. O'DONNELL.

Denver, Colo.

"A GENTLEMANLY MENDACIOUS" WITNESS.

In Robbins on American Advocacy, a very interesting and instructive work, is a classification of different kinds of witnesses. There is the lying witness, the dogged witness and the cunning witness. There is also the stupid witness, well known to the legal profession, a person well meaning, endeavoring to be honest, but blunders for want of sense, and there are other witnesses too numerous to tabulate. Perhaps the best known division is that of a pessimistic judge, who announced that in his opinion there were only three classes of witnesses: "Liars, damn liars and expert witnesses." The Supreme Court of Washington, as will appear later, has recently added another class of witnesses, whereof the above title is descriptive.

King David declared: "I said in my haste all men are liars," but there is no evidence that he changed his views after mature reflection. From time immemorial

the problem of how to arrive at the truth; that is, the real unbiased facts of a controversy, has engaged jurists and philosophers; no one has yet offered a solution or devised a method by which oral testimony can reproduce to the court or jury the exact facts of a transaction; what was said or done by the parties, or of the situation and surroundings of the subject matter involved. Much depends upon the inflection of the voice and the facial expressions of a person. In a case where a barrister sued for slander because the defendant had said of and concerning the plaintiff: "He is an honest lawyer," the judge remarked that such an expression appeared to be highly complimentary and not slanderous. The plaintiff rejoined: "Your lordship should have heard the emphasis put upon the word 'honest,' and you would think differently."

Many a snapshot from a camera has prevented endless bickerings in court and established definitely what otherwise would have been left in obscurity. The ingenuity of man to distort the truth may, however, apply to a photograph and instead of representing a true picture it may be an artificial deception, as was said in Cunningham v. Fairhaven Ry. Co.,[1] "through intentional and skillful manipulations, a photograph may not only be inaccurate, but dangerously misleading." In Geer v. Missouri Lumber Co.[2] it was held that a "photolithographic" copy of a signature could not be received in evidence as an exact reproduction of the original because "the perfection of the photograph depends upon many circumstances and conditions, such as the skill of the operator, the correctness of the lenses, the purity of the chemicals, the accuracy of the focussing and the angle at which the original to be copied was inclined to the sensitive plate." It, therefore, follows that a photograph may show the exact condition of things or give an accurate picture of a person, object or location, if the work is skillfully and honestly done. Paraphrasing a well-known expression about figures, one may say that photographs will not lie, but liars will make photographs.

The courts are in conflict as to photographs being used to determine the genuineness of a signature by comparison.[3] Of course, if the original writing is produced photographic enlargements may be offered in evidence.[4] When photography was first introduced as a means of evidence in court does not appear from the reports, but J. G. Holland, in his novel "Seven Oaks," page 404, published in 1875, described a sensational method of illustrating a forgery case by the use of lantern slides upon the walls of a court house, which appears to have occurred in a trial. The older books refer to ambrotypes and daguerreotypes.

In later days the Roentgen or X-Ray has certainly been of the greatest service in determining facts not visible to the eye, as the fracture or decay of a bone; the defective structure of steel, or the condition of the body in cases of malpractice in dentistry or surgery. Evidence obtained by this invention was at first considered unreliable, but the law, as usual, caught up slowly with the progress of science, and now approves of "X-ray photographs, sciagraphs or radiographs" and they are admissible in evidence as photographs of the interior of things.[5]

As the purpose of a trial is to determine what the actual facts in issue may be, courts have quite readily availed themselves of every new invention, process or discovery in their quest for truth. Even the photograph has done duty in court. The first case appears to have been Boyne City Ry. Co. v. Anderson,[6] where there was a controversy over the amount of damages to

(1) 43 Atl. 1049, Conn.
(2) 34 S. W. 1099, Mo.
(3) Hampton v. Norfolk Ry. Co., 35 L. R. A. 812.
(4) Osborn on Questioned Documents, 38.
(5) Miller v. Damon, 24 Wash. 648.
(6) 109 N. W. 429, Mich.

be allowed in the condemnation of property. A phonograph was used to reproduce to the jury the noise caused by the moving of trains near a hotel.

The dictagraph is the most modern invention to reproduce actual conversations. In State v. Minneapolis Milk Co.[7] a detective was a stenographer and made shorthand notes of things heard over the dictagraph. These notes were received in evidence, the court holding it was for the jury to pass upon their value as proof. This case was decided December 12, 1913. Since then People v. Eng Hing[8] was reported where "two stenographers were stationed in a room with the receiving end of the dictagraph," and such testimony held admissible.

In Commonwealth v. Wakelin,[9] stenographic notes of conversations heard by means of a dictagraph were admitted as evidence. The jury were instructed to determine what weight should be given such testimony. Other rulings on the dictagraph are found in 91 Misc. Reports (N. Y.) 107 and Andrews v. State.[10] The latter appears to be the first case on record where the dictagraph is referred to as a means of securing evidence. In fact, K. M. Turner, who claimed to be the inventor, testified in court as to its construction and "an autoptic profference of the scientific principle involved in the dictagraph was explained to the jury," according to the report.

These decisions comprise all there is to be found on the subject in the reported cases.

Magnifying glasses have been permitted to be used by jurors.[11] Maps, models, sketches, plans and drawings are all serviceable instruments to aid the court and jury in determining disputed facts in litigation.[12] Of course, before they can be admitted preliminary evidence should be given to show the correctness of the representation or instrument, which is for the determination of the trial judge and not subject to review.[13]

We have thus enumerated modern instrumentalities recognized by law for the ascertainment of truth. All these, however, may be circumvented if witnesses really plan to deceive. No doubt, most witnesses endeavor to testify honestly and correctly, but at times a statement may be literally true and yet dishonest. Recently there was a cartoon in the daily papers of Mutt and Jeff. As usual these jolly vagabonds were playing their pranks. So Jeff sent a message to Mutt that he, Jeff, had just fallen from a sixty-foot ladder. Mutt was greatly shocked by the sad news expecting to find his pal crushed and bleeding, when it developed that Jeff had only fallen off the lowest rung of the ladder.

Another celebrated instance may be cited from Don Quixote, chap. XLV. Sancho Panza became a judge before whom a man complained that he had loaned a friend "ten gold crowns" that had not been repaid. The creditor asked that the debtor be sworn and if he on oath stated that he repaid it the lender would be satisfied. The borrower then consented to be sworn and requested that the plaintiff hold the defendant's cane. He admitted that "the other had lent him ten crowns, but that he had really returned the same sum into his own hands." This satisfied the claimant, but not Sancho for he "studied awhile with his head leaning over his stomach, and his forefinger on his nose," and decided that the cane should be given the plaintiff in discharge of the debt. This surprised everybody, but when the cane was broken there dropped out the ten crowns. The

(7) 51 L. R. A. (N. S.) 244, Minn.
(8) 106 N. E. 96, N. Y.
(9) 120 N. E. 209, Mass.
(10) 33 Ohio Circuit Court, 564, decided September 12, 1912.
(11) Barker v. Town of Perry, 25 N. W. 100, Ia.
(12) Jones on Evidence, Section 411.
(13) Commonwealth v. Morgan, 34 N. E. 458, Mass.

oath was literally true, yet false in fact, as such testimony would be generally understood. When this was demonstrated Sancho shrewdly observed "that he has a headpiece fit to govern a whole kingdom."

Nor is it always safe for counsel to be too truthful of his own views about his case, or client. It is related that Charles Phillips, an eminent Irish lawyer, defended an elderly lady of great wealth, in a breach of promise case. She had agreed to marry a much younger man than herself, but as she was extremely homely, Phillips argued to the jury that plaintiff entered into the marriage contract for purely mercenary purposes. He, therefore, stated that as his client was such a very homely old woman, the young man was after her money, and cared otherwise nothing about her. The jury found for the defendant. This appeared to be a great triumph for counsel, but not to his client. As soon as Phillips emerged from the court room she beat him with her umbrella and berated him fiercely; for, said she: "I would much rather have lost the case than to have you tell the public that I am an ugly looking old woman."

Witnesses, however, may honestly believe that they are telling the truth, but by reason of bias, defective observation or inability to express themselves clearly, or for lack of judgment as to distance or faulty vision, may be mistaken or their testimony may be misleading and unreliable. Absolute verity cannot be expected and it is unattainable when witnesses testify from memory or observation. Pope's lines are in point:

"To observation which ourselves we make,
We grow more partial for the observer's sake."

There is one class of testimony that seems to be an exception. Whenever the character or reputation of a woman is involved, men instinctively try to shield her, and this meets, generally speaking, with public approval. Perhaps the most noted instance in modern times occurred in a trial known as The Tranby Croft baccarat case before Lord Chief Justice Coleridge in 1891.[14] The Prince of Wales, later Edward VII, was called as a witness. His statements might have reflected seriously upon the character of a titled lady. At the conclusion of his testimony his Lordship remarked to a friend by his side: "The Prince testified like a gentleman." There may be persons who would state the literal truth, if under oath, no matter who might be concerned, or whom it might affect, but, after all, there is a limit beyond which the community would not justify a witness to go; it may be better that a cause be lost than to debauch public morals or outrage a sentiment of common decency.

It was no doubt with a view to public policy that the Supreme Court of Washington, in Bundy v. Dickinson,[15] sustained a verdict for $30,000.00 damages for breach of promise to marry, scoring the defendant, thus:

"He denied that love impelled them to seek the society of each other, and instead of being *gentlemanly mendacious* or discreetly silent when a woman's reputation was at stake, he, with surprising effrontery, testified that they were incited solely by his concupiscence and mutually agreed that marriage was not to be considered by them." Here is a judicial declaration that a man should regard the good name of womankind as sacred, and that he is not justified, for the sake of adhering to the literal truth as a witness, to degrade womanhood.

From the foregoing we may draw this conclusion: that truth is a relative term; all that can be expected of a witness is that he be candid in his statements, and that he testify in good faith, based upon common sense.

FRED H. PETERSON.

Seattle, Wash.

(14) Life of Sir Edward Clarke, 269.
(15) 182 Pacific, 947, decided August 5, 1919.

INFANCY—DISAFFIRMANCE OF CONTRACT.

McGUCKIAN v. CARPENTER.

Supreme Court of Rhode Island. June 24, 1920.

110 Atl. 402.

When an executed contract is not one for his necessaries, an infant should be permitted to disaffirm it and recover the consideration moving from him, and should be required to return the consideration that remains in his hands; but, if he has dissipated the consideration and cannot restore it, he should nevertheless be permitted to disaffirm and recover the consideration.

SWEETLAND, C. J. The first of the above-entitled cases is an action in assumpsit to recover the amount due upon certain promissory notes given by the defendant, a minor, to the plaintiff in part payment upon the sale by the plaintiff to the defendant of a horse, wagon, and harness. The second of the above-entitled cases is an action in assumpsit to recover the sum paid in cash by the infant plaintiff in part payment for said horse, wagon, and harness.

The cases were tried together before a justice of the superior court, sitting with a jury, and resulted in each case in a verdict for said minor, Arthur H. Carpenter. Hugh McGuckian filed his motion for a new trial in each case, and each motion was denied by said justice. Each case is before us upon the exception of McGuckian to the decision of the justice denying the motion for new trial, and also upon certain exceptions take by said McGuckian to rulings of said justice made in the course of the trial.

At the trial McGuckian did not question the infancy of Carpenter at the time of the sale of said horse, wagon, and harness, but claimed that in the circumstances of the case said chattels were necessaries for said infant.

It appeared in evidence that Carpenter at the time of the purchase by him of the horse, wagon, and harness was 18 years of age, married, with one child; that he maintained a home and was dependent upon his weekly wages for the support of himself and family; that he used said chattels for the sole purpose of pleasure driving. The question of whether said chattels were necessaries in the plaintiff's condition and station in life was submitted by said justice to the jury with instructions that, if they found that said chattels were not necessaries they should find their verdict in favor of said infant in the action against him upon the promissory notes given by him in part payment for said chattels. The jury's verdict for the defendant in that case indicates that they found that said horse, wagon, and harness were not necessaries in the circumstances of the defendant's life. The verdict has been approved by said justice, and we find no ground for disturbing his decision in that regard. The purchase was manifestly an unwise and indiscreet transaction on the part of the defendant quite in accord with the thoughtlessness and improvidence ascribed to youth.

At the time of the avoidance of the contract of sale by the minor and the commencement of the action to recover the amount of cash given by him in part payment, he did not return said chattels nor any part of them to McGuckian, nor has he done so subsequently. Prior to said disaffirmance Carpenter had sold the wagon and harness, and the horse had become so emaciated and disabled either by disease or neglect that in the judgment of the agent of the Society for Prevention of Cruelty to Animals it ought to be shot. From the evidence it is not entirely clear what has become of the horse, but it is manifest that it had become worthless and had passed out of the possession of Carpenter before the commencement of these actions. In the suit against McGuckian to recover the cash paid on the purchase price the defendant takes the position that, as Carpenter has not returned the property, he ought not to be permitted to disaffirm the sale and obtain a return of the money paid. This claim was the basis of a motion, made at the close of the evidence in the case against McGuckian, that said justice should direct a verdict for the defendant. That motion was denied by said justice, and the defendant excepted. He also excepted to that portion of the charge of said justice in which he instructed the jury "that, if Carpenter had disposed of the chattels which came to him or if they were not in his possession or control, it would not be necessary for him to restore them to McGuckian before he could maintain the action." In support of these exceptions before us counsel for McGuckian has called to our attention the opinion of courts in some jurisdictions that in all cases an infant, on his avoidance of an executed contract, must return the property or consideration received before he can maintain his action for the money or property which he gave in the transaction, and, if he has disposed of the money or goods or has so misused them that he cannot restore them, then he cannot be permitted to disaffirm his con-

tract. These cases are based on the consideration that minors should not be permitted to use the shield of infancy as a cover for dishonesty and the doing of injury to others dealing with them in good faith. We do not find that this court has passed upon the exact question involved in this exception. We are of the opinion that, when an executed contract is not one for his necessaries, an infant should be permitted to disaffirm it and recover the consideration moving from him, and should be required on his part to return the consideration that remains in his hands; but, if he has dissipated the consideration or lost it, or for any reason he is unable to restore it to the other party, he none the less should be permitted to disaffirm the contract and recover back the consideration moving from him. The law gives to a minor the right to disaffirm his contracts on the ground of the disability of infancy. This has been provided as a protection to him from the consequences of his own improvidence and folly. It is the same lack of foresight that in most instances leads to his dissipation of the proceeds of his voidable contracts. To say that he shall not have the protection by disaffirmance with which the policy of the law seeks to guard him, unless he has had sufficient prudence to retain the consideration of the contract he wishes to avoid, would in many instances deprive him, because of his indiscretion, of the very defense which the law intended that he should have against the results of his indiscretion.

A determination made in accordance with either view as to an infant's right of disaffirmance, when he is unable to return the consideration of the contract, will in many cases result in considerable hardship to one party or the other. Not infrequently, even in cases where the infant still has the consideration and returns it to the other party to the contract, such other party is far from being placed in statu quo. It has been said that the right of an infant to avoid his contract is absolute and paramount to all equities.

The view which we have taken appears to us to have the support of the weight of authority. In the early case of Bartlett v. Cowles, 15 Gray (Mass.) 445, the court appears to have taken the contrary view and to have held that an infant might avoid his contract only by restoring the consideration. In the later case of Bartlett v. Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101, the doctrine of Bartlett v. Cowles, supra, was expressly repudiated, and in Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117, it was held that an infant's deed may be avoided "without the previous return, or offer to return, the consideration paid therefor." The rule in Chandler v. Simmons has been followed in the later Massachusetts cases. Pyne v. Wood, 145 Mass. 558, 14 N. E. 775; McCarthy v. Henderson, 138 Mass. 310; Morse v. Ely, 154 Mass. 458, N. E. 577, 26 Am. St. Rep. 263; White v. New Bedford, etc., 178 Mass. 20, 59, N. E. 642. See, also, MacGreal v. Taylor, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326; Peacox v. Griffith, 76 Iowa, 89, 40 N. W. 109; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194.

We find no error in the refusal to direct a verdict in accordance with the motion of McGuckian, nor in that portion of the charge to which exception was taken.

All of the exceptions of McGuckian in each case are overruled. Each case is remitted to the superior court for the entry of judgment on the verdict.

NOTE—*Return of Consideration by Infant Disaffirming Contract.*—In Bloomer v. Nolan, 36 Neb. 51, it was said that: "One who seeks to disaffirm a contract made on the ground that he was an infant at the time of its execution is required to return so much of the consideration received by him as remains in his possession at the time of such election, but is not required to return an equivalent for such part thereof as may have been disposed of during his minority."

In Reynolds v. McCurry, 100 Ill. 356, the rule is stated thus: "It is a general rule that where the consideration of a conveyance by an infant has been expended, so that he is not in a condition to restore it, he may nevertheless avoid the conveyance. It is only when he still has the consideration that he will be compelled to return it."

And in Chandler v. Simmons, 97 Miss. 508, 93 Am. Dec. 17, it is said: "If money paid to a minor as a consideration for his conveyance of real estate has been wasted or spent by him during his minority, payment or tender of the amount is not necessary to enable him to avoid the conveyance."

While in the Reynolds case, *supra*, nothing is said about expenditure during minority, so that the consideration cannot be restored, yet it seems to me this is implied, because there should be a rule that if, after majority, one uses the con-

sideration or any part thereof received during minority, this ought to amount to ratification.

Thus in Price v. Furman, 27 Vt. 271, 65 Am. Dec. 194, it is ruled that a condition of excuse for non-return of consideration is its passing out of infant's possession during minority. But it does not seem that the consideration must have been wasted during minority. It is sufficient if it has been consumed. Nichol v. Steger, 2 Tenn. Ch. 328, affirmed in 6 Lea 393.

This principle of consumption of consideration extends even to the right of a minor to disaffirm a chattel mortgage executed for borrowed money, the mortgagor not being able to repay. Miller v. Smith, 26 Minn. 248, 37 Am. Rep. 407, 20 Alb. L. J. 412.

In Tucker v. Moreland, 10 Pet. 58, it is said at page 71 of the opinion: "There is no doubt that an infant may avoid his act, deed or contract, by different means, according to the nature of the act and the circumstances of the case. He may sometimes avoid it by matter in pais, as in case of a feoffment by an entry; * * * sometimes by suit, as when he disaffirms a contract made for the sale of his chattels, and sues for the chattels. * * * The general result seems to be he must avoid it by some act of record, during his minority." In this case it was held that a subsequent deed there was avoidance amounting to disaffirmance of a former deed made during minority, where the subsequent deed was after majority, but it was held in effect that the subsequent deed must be within a short period after majority, or acquiescence will be presumed.

It was ruled in Dawson v. Helmes, 30 Minn. 107, that a subsequent deed executed after minor comes of age is a disaffirmance of a deed during minority and former grantee need not be placed in statu quo by restoration of consideration, but the Court said if infant applies to a court of equity the rule might be different, it being argued that "the former infant may, in some circumstances, be liable to restore the consideration to his grantee, or otherwise to place him in statu quo, but it does not follow that he must do either of these things as a condition precedent of disaffirmance."

This subject has been provided for, in a measure, by statute in some states, but it would seem true that whether the consideration has been necessarily consumed or extravagantly wasted, the result leaving the infant unable to restore the consideration is the same. And also it would appear that the grantee of an infant remains a reasonable time subject to have his conveyance disaffirmed, if disaffirmance is resorted to within a reasonable time after majority. In such case also it would seem an infant ought to be held liable on some general judgment for what he has consumed or wasted, especially if necessaries have been bought.

C.

ITEMS OF PROFESSIONAL INTEREST.

TWELVE INTERNATIONAL JURISTS ARE AMONG WORLD'S BIGGEST MEN.

The twelve distinguished international jurists, among them Elihu Root, of the United States, invited by the executive council of the League of Nations to plan the organization of the new permanent court of international justice, constitute an impressive array of the world's most competent authorities on questions of international legislation. Those who accepted the invitation gathered at the Hague in mid-June to undertake the task. Those invited were:

Baron Descamps, Belgian minister of state, professor of international law at Louvain University; member of the permanent court of arbitration of The Hague, and secretary general, formerly president, of the institute of international law and writer on international questions.

M. Drago, formerly foreign minister of the Argentine Republic. While holding that office he sent to the Argentine minister in Washington instructions known as the Drago Doctrine (1902). He was formerly judge in Argentina; one of the arbitrators nominated by agreement between Great Britain and the United States in the North Atlantic Fisheries arbitration, The Hague (1910); one of the Argentine delegates to the second peace conference at The Hague and member of the permanent court of arbitration of The Hague.

Prof. Fadda, professor of Roman law at Naples University.

M. Fromageot, legal adviser to the French foreign minister; member of the permanent court of arbitration of The Hague, and delegate to the second Hague peace conference.

M. Gram, formerly a judge on the mixed tribunals in Egypt; former member of the supreme court of Norway; minister of state at Stockholm before the severance of the union between Norway and Sweden; member of the permanent court of arbitration at The Hague and member of the institute of international law.

Dr. Lower, member of the Cour de Cassation of the Netherlands.

Lord Phillimgore, English privy councillor; a lord justice of appeal (1913-1916); president of the International Law Association (1905-1908); author of publications on ecclesiastical and international law and Three Centuries of

Treaties of Peace and Their Teaching (1917); president of committee of inquiry appointed by the British government on the subject of the League of Nations.

Elihu Root, former secretary of state, United States; president of the American Society of International Law; member of the permanent court of arbitration of The Hague, senior counsel for the United States in the North Atlantic Fisheries arbitration at The Hague (1910); member of the Alaskan boundary tribunal and head of special United States mission to Russia (1917).

Dr. George F. Hagerup, formerly premier of Norway and Norwegian minister to Denmark and Stockholm; member of the second Hague conference, where he supported the attitude of the United States on the inviolability of private property at sea.

Satsuo Akidluki, formerly Japanese ambassador to Vienna, and one of the legal advisers of Japanese peace delegation in Paris.

Rafael Altamira, professor of law in Madrid University; senator.

Clovis Bevilacqua, professor of law and legal adviser to the minister of foreign affairs, Brazil.

CORRESPONDENCE.

THE WORK OF CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS.

Editor, Central Law Journal:

I see your editorial in a recent issue of the Journal on Uniform State Laws. I have noted for years the work that has been done along this line. I have always thought that it was based upon an idealism better suited to Arcadia than to this Union of forty-eight States.

There is a Conference of Commissioners on Uniform State Laws that is to meet in St. Louis; these men are to fix up a set of Uniform State Laws for the entire Union. I take it that it is expected that the legislatures of the different states are to gulp down these laws as the work of this commission because they are prepared by this great super-authority. The question comes will the legislatures do it? Will they recognize the authority and the superior knowledge of these commissioners? Further, are the Supreme Courts of the different states going to construe these laws the same way after the legislatures pass them, or have these different Supreme Courts got to go back to this great fountain of knowledge and imbibe there before they can decide questions arising upon the construction of these laws in order to have uniformity?

We might get a side light upon the question by considering the decisions of the different Courts of Appeals of the United States in the different circuits. Here we might expect to find uniformity, but it does not exist even with the right of certiorari to the Supreme Court of the United States.

The work of these commissioners ought to be appreciated; they are true patriots, devoting their time and spending their own money in pursuance of their ideas; but I am not sure that a majority of the Bar who make their living by practicing law care a tinker's dam whether the laws in the different states are uniform or not.

GEORGE F. GOBER.

Atlanta, Ga.

[We welcome the opportunity not only to print our correspondent's criticism of the work of the Conference of Commissioners on Uniform State Laws but also to answer the view expressed therein which whether representing a majority of the bar, as our correspondent thinks, or not, at least expresses the view of a considerable number of those who have not made a careful study of the work of the Conference.

It is impossible here to explain the origin, history and legislative output of this great legislative body. Suffice it to say that it is the creature of the American Bar Association and its great success should be a matter of pride on the part of every attorney interested in the growth of the influence of his profession.

Our correspondent is probably not as familiar with the work of the Conference since his State, Georgia, has not passed any of the important Commercial Codes. The Negotiable Instruments Law has been passed in every state and territory except Georgia.

The outstanding advantages of these great commercial codes like the Uniform Negotiable Instruments Law, the Uniform Sales Act, the Uniform Warehouse Receipt Act and the Uniform Bill of Lading Act is first uniformity; second, accuracy and clearness. If it be true, which we do not admit, that the majority of lawyers "do not care a tinker's dam whether the laws in different states are uniform or not," we are quite sure that the business men of the country are deeply interested. Any business man whose activities overflow the boundaries of a single state is very much concerned over the obligations and liabilities created by the transactions into which he enters. A friend from Texas wrote us not long ago, that the Texas legislature refused to become interested in the Uniform Negotiable Instruments Law until it was discovered that foreign bankers and insurance companies regarded loans in that state as not being as desirable as loans in states having the Uniform Negotiable Instruments Law. This had a tendency to increase interest rates which had the effect last year to induce the Texas legislature to adopt the Uniform Negotiable Instruments Law.

We do not see why lawyers also should not be interested in having the subject of commercial law codified and standardized throughout the country. Business is no longer local and every lawyer who handles commercial matters is not infrequently called upon to pass upon the law in other states. It makes such investigations easy when the law of the other state is the same

in every important particular as the law of one's own state.

Moreover, codification eliminates much of the confusion in the law due to conflicting decisions. It substitutes for the uncertain declarations of the courts the clear and unambiguous statements of a code. When it is understood that these great codes have the benefit of the closest scrutiny of the greatest legal minds of the country and that it takes from five to ten years to pass a single act; that every draft is prepared by experts in legislative drafting and then submitted to business men and lawyers familiar with the subject matter of the code in its practical application, one can readily see why such a great code like the Uniform Negotiable Instruments Law should have met with such great success and have reduced litigation on that subject to a minimum.

The second of the great codes prepared by the Conference, the Sales Act, was drafted by Hon. Samuel Williston of Harvard University, an expert in the law of sales. This act was debated for many years and after many changes, corrections and additions was finally adopted. It is one of the greatest codes in the world and the more lawyers and business men come to study and to apply it, the more do they wonder at its comprehensiveness and at its absolute certainty and clearness.

This great Conference belongs to the bar; it represents the lawyer's contribution to the improvement of the law and we suggest that, before lawyers make more difficult the task of the Commissioners who labor without recompense to make the law clearer and more accurate, they make a careful investigation of the work and plans of the Conference. The Comissioners are not above making mistakes and no doubt their work could be improved. We are quite sure that they would welcome criticism if such criticism is of the kind that suggests how and where an improvement can be made.—Editor.]

BOOKS RECEIVED.

The Declaration of London, February 26, 1909. A collection of official papers and documents relating to the International Naval Conference held in London, December, 1908—February, 1909. With an introduction by Elihu Root. Edited by James Brown Scott. New York. Oxford University Press. Price, $2.00.

James Madison's Notes of Debates in the Federal Convention of 1787, and their relation to a more perfect society of nations. By James Brown Scott, Technical Delegate of the United States to the Second Hague Peace Conference; Member of the Institute of International Law; President of the American Institute of International Law. New York. Oxford University Press. Price, $2.00.

Treaties for the Advancement of Peace between the United States and other Powers negotiated by the Honorable William J. Bryan, Secretary of State of the United States. With an introduction by James Brown Scott. New York. Oxford University Press. Price, $1.50.

HUMOR OF THE LAW.

The blind chaplain of the House had completed his prayer. A little boy in the gallery said:

"Father, was that man praying for the Congressmen?"

The father said: "Oh, no, my son, he is not praying for the Congressmen; they are going to pass laws and he is praying for the people."

The trial of Rollin Bunch, Mayor, and Horace Murphy, Prosecuting Attorney, of Muncie, was on in the United States District Court at Indianapolis, and every day Muncie persons and others who were acquainted with the remarkable case came too late to obtain seats in the courtroom. A Muncie young woman one day rushed impulsively up to a man acquaintance whose business took him inside the courtroom, and finding all the seats were taken, she exclaimed:

"Oh, can't you squeeze me in there?"

"No," he responded, gravely, "not in *there*."
—*Indianapolis News.*

Good old Queen Bess, it appears, had a pretty wit, which she was by no means loth to exercise upon her subjects. In one verbal duel, at least, Elizabeth got the worst of it. Observing in the garden a courtier to whom she had promised promotion that had not materialized, her majesty thrust her head out of the window and called to him:

"What does a man think of, Sir Edward, when he thinks of nothing?"

"Of a woman's promise, your majesty," was Edward's response.—*Philadelphia Public Ledger.*

Admiral Browning of the British Navy is a wit as well as a disciplinarian. A story is told of his quick repartee when he was a captain of a battleship. A ready-tongued member of the crew was brought before him, charged with having broken his leave outrageously. The evidence being heard, the Captain asked the culprit: "Have you anything to say in your defense?" "Nothin', sir," came the reply, "except, 'To err is human, to forgive divine.'—Shakespeare." "Ninety days' detention without the option of a fine.—Browning," was the apt but stern rejoinder. —*Outlook.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adoption** — Inheritance.—Formal legal adoption essential to give child right of inheritance.—In re Chambers Estate, N. Y., 183 N. Y. Sup. 526.

2. **Attachment** — Special Execution.—In absence of statutory requirement, in an attachment suit a general judgment, execution, and levy on the property attached, while judgment does not mention the property attached nor order a special execution against it, does not thereby waive the attachment lien on said property.—First Nat'l Bank of Elida v. George, N. Mex., 190 Pac. 1026.

3. **Bankruptcy** — Attorney Fee.—Money retained by an attorney as a fee from a fund recovered by him for his client, and on which he had a lien for his services, does not constitute a preferential payment, recoverable by the trustee on the subsequent bankruptcy of the client.—Van Slyke v. Huntington, U. S. C. C. A., 265 Fed. 86.

4.——Discharge.—Discharge in bankruptcy cannot be set up in bar in an action on a debt not provable in the bankruptcy proceedings. —Drake v. Hodgson, N. Y., 183 N. Y. Sup. 486.

5.——Estoppel.—Where petitioner for voluntary bankruptcy in his schedule stated that a note was given to his wife, and the contract between them provided that the wife should take the note, executed to others, in satisfaction of maintenance and support court might award her in divorce proceedings, or in satisfaction of claim for support of herself and children, the bankrupt cannot claim that the note was given as attorney's fees, and a judgment for the note was a liability for maintenance or support of wife or child, which is not a dischargeable debt, under Bankruptcy Act, § 17, as amended in 1903 (Comp. St. § 9601).—Blackstock v. Blackstock, U. S. C. C. A., 265 Fed. 249.

6.——Forfeiture.—Where a mining lease held by bankrupt became subject to forfeiture under its terms pending the proceedings, the trustee will be permitted to avoid the forfeiture and retain the lease by paying the royalty in arrears.—In re Barnhardt Coal & Limestone Co., U. S. D. C., 265 Fed. 385.

7.——Malicious Injury.—A complaint in an action in a state court, alleging that defendant, having in his possession money which was the property of plaintiff, refused to pay over the same and converted it to his own use, held to charge a willful and malicious injury to property, a judgment for which, if the allegations were sustained, would not be dischargeable in bankruptcy, and the defendant, on his subsequent bankruptcy, held not entitled to an injunction restraining further prosecution of the action.—In re Northrup, U. S. D. C., 265 Fed. 420.

8.——Purpose of Statute.—The purpose of the federal bankruptcy law, as well as the Louisiana Code on insolvency, is to permit the unfortunate debtor who finds himself unable to pay his debts to surrender his present property to his creditors for application to the payment of their claims, and thereby obtain relief from all further liability in the future.—Schexnailder v. Fontenot, La., 85 So. 207.

9. **Bastards**—Putative Father.—While the putative father of a bastard child might be entitled to its custody as against strangers, he would not be entitled to its custody as against adopting parents, upon whom rests a legal duty to support, educate and care for such child.—Ex parte Wallace, N. Mex., 190 Pac. 1020.

10. **Bills and Notes**—Notice of Dishonor.—Notice of dishonor of a bill or note, addressed to an indorser by name and mailed, but without being addressed to any place, is of no validity.—Peoples Bk. & Trust Co. v. Allen, N. J., 110 Atl. 704.

11. **Carriers of Goods**—Lawful Seizure.—Where goods are delivered to a common carrier for transportation, and the consignor, being present where the goods are, attempts to sell and to actually deliver the goods to a person there present, in violation or federal law, an apparently lawful seizure of the goods by federal officers as an incident to the arrest of the consignor for violating the federal law in attempting to unlawfully sell and deliver the goods, exempts the carrier from liability for the value of the goods, where the seizure amounts to a vis major, and the carrier is not at fault in the premises.—Hammers v. Southern Express Co., Fla., 85 So. 246.

12. **Carriers of Passengers** — Last Clear Chance.—Notwithstanding a person may be placed in a position of great peril by his own negligence, it is the duty of a railroad to avoid further injury, if able to do so by exercising ordinary care, whether he be passenger or trespasser.—Johnston v. Interborough Rapid Transit Co., N. Y., 183 N. Y. Sup. 224.

13.——Obvious Danger.—A subsurface railroad was not negligent in failing to warn a passenger of an open space between station platform and car, which she in fact saw, as it could act on the assumption she would use ordinary care to avoid any obvious danger.—Lang v. Interborough Rapid Transit Co., N. Y., 183 N. Y. Sup. 270.

14. **Certiorari**—Judicial Discretion.—The writ of certiorari is a discretionary writ, and a motion may be made to quash it, either on the papers on which it was granted or on additional affidavits, and either before or after the return thereto.—City of New York v. Nixon, N. Y., 183 N. Y. Sup. 6.

15. **Charities**—Gift.—A gift is a "charity" if the purpose to be obtained is not personal,

private or selfish.—In re Burnham's Estate, N. Y., 183 N. Y. Sup. 538.

16. **Conspiracy** — Strike.—A strike may be lawful or unlawful, according to the motives or intention of the strikers, and may be an illegal conspiracy in its inception, if it is a combination to do an illegal act by legal means, or any act by illegal means.—Michaels v. Hillman, N. Y., 183 N. Y. Sup. 195.

17. **Contracts** — Competency to Contract.—Mere weakness of mind, unaccompanied by any other inequitable incident, if the person has sufficient intelligence to understand the nature of the transaction and is left to act upon his own free will, is not a sufficient ground to set aside an agreement.—Douglas v. Ogle, Fla., 85 So. 243.

18.——Entirety.—Where a contract is entire, there is a right of rescission thereof for a partial failure of consideration under Civ. Code, § 1689, providing that plaintiff offers to restore to defendants everything of value received under the contract in view of § 1691.—Vaughn v. Fey, Cal., 190 Pac. 1041.

19.——Extra Work.—Where contract requires written order for extra work, a provision therein that no specification should be waived by either party, unless the waiver was in writing and duly signed, may in turn be waived, if the parties see fit.—Cramp & Co. v. Central Realty Corporation of Philadelphia, Pa., 110 Atl. 763.

20.——Meeting of Minds.—Contracts as a rule are derived from consent, and cannot be binding where there is no real consent established.—Rissmiller v. Evangelical Lutheran Congregation, St. Peters, Plainfield Tp., Northampton County, Pa., 110 Atl. 740.

21.——Modification.—It is a general rule at common law that the parties to a written agreement may modify it by a subsequent parol agreement.—Producers' Coke Co. v. Hoover, Pa., 110 Atl. 733.

22.——Ousting Jurisdiction.—In view of Code Civ. Proc. §§ 2365-2386, an arbitration agreement in a sale contract was a mere nullity, in so far as it attempted to oust the courts of jurisdiction, and was revocable by either party.—Berkovitz v. Arbid & Houlberg, N. Y., 183 N. Y. Sup. 304.

23.——Performance.—Plaintiff, who was engaged by defendant to sing for specified number of phonograph records during the year, was required to perform the contract in so far as she was called upon to perform during the year, and could not refuse to sing, within the year, on the ground that there was not sufficient time to perform contract before expiration thereof.—Lyon v. Starr Piano Co., N. Y., 183 N. Y. Sup. 286.

24.——Public Policy.—All contracts, the purpose of which is to create a situation which tends to operate to the detriment of the public interest, are against public policy and void, regardless of whether in a particular case the purpose of the contract is effectuated.—King v. Randall, Nev., 110 Pac. 979.

25.——Seal.—A contract under seal may be waived by performance of an oral agreement given for a good consideration.—Brune v. Von Lehn, N. Y., 183 N. Y. Sup. 360.

26.——Waiver.—A party to a contract may waive any term intended for his benefit, and this, if agreed to and acquiesced in by the other party, modifies the contract accordingly.—James v. Ward, Ore., 190 Pac. 1105.

27. **Covenants** — Eviction.—To constitute an eviction which will operate as a breach of covenant of warranty, the ouster need not be from the entire premises, but from part only of them.—Bliss Town-Site Co. v. Morris-Roberts Co., Idaho, 190 Pac. 1028.

28.——Paramount Title.—The covenant of seizin in a general warranty deed does not embrace a title already vested in the vendee, but only extends to and is broken only by a paramount title existing in a third party.—H. Weston Lumber Co. v. Lacey Lumber Co., Miss., 85 So. 193.

29.——Restrictions.—A building line restriction as to lots within a particular block may be valid, though not imposed on the rest of the grantor's land, and is for the benefit of all other lots in the block, enforceable in favor of all who subsequently take title to the lots from the grantor.—Rogers v. Zwolak, Dela., 110 Atl. 674.

30. **Corporations**—Accounting by Stockholder.—Where stockholders were virtually partners, and stock of stockholder was purchased from him in part with corporate funds and for the benefit of the company, plaintiff stockholder is entitled to an accounting for such funds from defendant stockholders, to whom the stock was transferred by the selling partner; a court of equity having power, in view of circumstances, to disregard corporate entity, and to hold defendants liable to account directly to plaintiff.—Gallagher v. Perot, N. Y., 183 N. Y. Sup. 257.

31.——Primary Liability.—The liability of stockholders of a corporation is primary, and a stockholder cannot escape because a corporate creditor held a guaranty of the corporation's obligations.—Seaboard Nat. Bank of San Francisco v. Belden, Cal., 190 Pac. 1045.

32.——Salary to Officers.—Payments by corporation to officers and directors for services rendered without express agreement for compensation held improper as against creditors; such services being deemed to have been rendered without liability on part of corporation to pay therefor.—Taylor v. Ellsworth Bldg. Corporation, N. Y., 183 N. Y. Sup. 394.

33.——Set-Off by Stockholder.—The right of a holder of stock not paid for to set off a debt due him from the company ends when the company becomes insolvent, for the liability to pay for the stock is for the benefit of the company's creditors.—Cooper v. Easter Horse & Mule Co., Dela., 110 Atl. 666.

34. **Death**—Damages.—At a period when the purchasing power of money has been decreased, the value of the sum awarded for death is not to be estimated in the numerical quantum of the recompense, but in its comparative ability to furnish the necessities of life.—Bowes v. Public Service Ry. Co., N. J., 110 Atl. 699.

35. **Dedication**—Plat.—The selling of lots with reference to plat, with streets and roadways thereon, constitutes a dedication of such streets and roadways in rural as well as urban communities.—Iseringhausen v. Larcade, La., 85 So. 224.

36.——Plat.—By the plotting of land, recording of the plot, and conveyance of lots according thereto abutting on a street shown thereon, the street throughout its length and breadth is dedicated to public uses as a highway.—Reinhardt v. Chalfant, Del., 110 Atl. 663.

37. **Deeds**—Delivery.—Where a deed never came into the possession of the grantee until it was delivered for record, it had no legal existence until that time, as the act of delivery is essential to the existence of any deed.—Atlas Portland Cement Co. v. Fox, D. C., 265 Fed. 444.

38.——Mutual Mistake.—The evidence of the mutual mistake must be so clear and satisfactory as to leave no fair and reasonable doubt that the writing does not correctly embody the real intention of the parties. A mere preponderance of the evidence will not suffice, and the burden of proof is on the party alleging the mutual mistake.—Udelavitz v. Ketchen, Idaho, 190 Pac. 1029.

39. **Domicile**—Living Place.—Where a change in the marking of the state boundary line showed that the sleeping and eating rooms in defendants' residence were in a state other than that in which defendants had considered themselves residents for 40 years, the intention does not control as it does in determining which one of several residences is a domicile,

but the domicile is in that state in which the living rooms actually were.—Blaine v. Murphy, U. S. D. C., 265 Fed. 324.

40. **Election of Remedies**—Conclusiveness.—Where plaintiff's prospective employer had agreed with plaintiff that he should purchase certain patent rights at a fixed price, and had given him cashier's checks for that purpose, in action by plaintiff in his individual name as trustee against a bank for refusal to pay such cashier's checks because of orders given by the employer held not inconsistent with a subsequent action by plaintiff against such employer for breach of the contract of employment, because of defendant employer's failure to organize a corporation to turn over to plaintiff part of the stock thereof and to employ him at a fixed salary; the parties to the two actions not being the same.—Bobrick v. MacKenzie, N. Y., 183 N. Y. Sup. 208.

41. **Equity**—Jurisdiction.—When a court of equity acquires jurisdiction for any purpose, it will as a general rule proceed to determine the whole cause, though in so doing it decides questions which, standing alone, would furnish no basis of equitable jurisdiction.—Pierce v. New York Dock Co., U. S. C. C. A., 265 Fed. 148.

42.——Unclean Hands.—Unfair business practices on the part of an agent, unknown to and unauthorized by his principal, held not to preclude the principal, under the doctrine of "unclean hands," from equitable relief against the person injured for unfair practices by such person against the principal.—Hedman Mfg. Co. v. Todd Protectograph Co., U. S. C. C. A., 265 Fed. 273.

43. **Escrows**—Condition of Delivery.—If a bank, after receiving a deed from the grantors therein named with instructions to deliver it to the grantee, on the payment of a certain sum of money, delivers the deeds on the payment of a smaller sum, the bank is responsible for the damages sustained by the grantors by reason of the delivery of the deed in violation of the instructions.—Stone v. Jarbalo State Bank, Kansas, 190 Pac. 1094.

44. **Frauds, Statute of**—Oral Promise.—Where the written evidence showed a loan to the husband of one defendant, plaintiff cannot recover on a subsequent oral promise by defendants to pay the debt, nor on a written promise by one defendant, which plaintiff refused to accept, because the other defendant declined to sign.—Teitler v. Schwartz, N. Y., 183 N. Y. Sup. 14.

45. **Fraudulent Conveyances**—Attachment.—Where the title to property is in another than the debtor, but it is claimed that the transfer of the title from the debtor was void as fraudulent, there is open to an attaching creditor aid from courts of appropriate jurisdiction by way of bills of equitable attachment.—Goldstein v. Banco Commerciale Italiana, N. Y., 183 N. Y. Sup. 460.

46. **Highways**—Purpresture.—A structure erected on ground subject to an easement for a publicway, which interferes with the public use of the land, is a public nuisance.—Armour & Co. v. City of Newport, R. I., 110 Atl. 645.

47. **Homicide**—Provocation by Words.—No mere words of reproach, however grievous or provoking, unaccompanied by any assault or mutual combat, are sufficient provocation to reduce an intentional and unjustifiable homicide from murder to manslaughter.—Richardson v. State, Miss., 85 So. 186.

48. **Husband and Wife**—Action by Wife.—Wife, suing for personal injuries, may recover for loss of wages, under Domestic Relations Law, § 60.—Schafer v. Rose-Gorman & Rose, N. Y., 183 N. Y. Sup. 162.

49.——Coercion.—Where a married woman commits an offense in the presence of her husband, or near enough to be under his immediate control and influence, she is presumed to have acted under his coercion, and, while he is responsible, she is excused, but this presumption is rebuttable.—State v. Grossman, N. J., 110 Atl. 711.

50.——Consortium.—Where a loss of consortium between husband and wife is caused by willful conduct of a third party, there is a legal injury for which damages are recoverable, irrespective of the prior existence of actual affection between the spouses.—Dey v. Dey, N. J., 110 Atl. 703.

51. **Indemnity**—Evidence.—A clause, in an agreement by employe to indemnify fidelity company for loss sustained under fidelity bond, that vouchers or other evidence showing payment by the fidelity company of any claim should be conclusive evidence of the fact and amount of liability, provided the payment was made in good faith, believing company was liable therefor, is valid.—National Surety Co. v. Fulton, N. Y., 183 N. Y. 237.

52. **Injunction**—Good Will.—The buyer of a business can enforce by injunction performance of the seller's undertaking not to engage in the business in the particular town.—Mouton v. Marshall, La., 85 So. 204.

53.——Violation of Covenant.—Ordinarily a suit will not lie at landlord's instance to enjoin tenant's violation of lease covenant against assigning or subletting, but doubtless equity may enjoin in issue such a case, if circumstances require such relief.—Twenty-fifth St. Realty Co. v. Wachtel, N. Y., 183 N. Y. Sup. 332.

54. **Insurance**—Divorce.—Where a wife has an insurable interest in her husband's life at the time he assigns to her a policy of insurance, the existence of an insurable interest at maturity of the policy is unnecessary, and her interest does not expire upon procurement of divorce.—Teed v. Brotherhood of American Yoemen, Wash., 190 Pac. 1005.

55. **Jury**—Vicinage.—The primary and literary meaning of "vicinage" is neighborhood or vicinity; a "county," on the other hand, being a definitely designated territory, and having a meaning vitally different.—Commonwealth v. Collins., Pa., 110 Atl. 738.

56. **Landlord and Tenant**—Repairs.—Where a landlord undertook to repair a guard railing on a roof used by his tenants for hanging out washing, the landlord is liable, although he was under no duty to make the repairs if reasonable care was not exercised.—Charney v. Cohen, N. J., 110 Atl. 698.

57. **Libel and Slander**—Defamatory Words.—Alleged defamatory words are to be construed according to their usual, popular, natural meaning and common acceptation; that is, in the sense in which persons out of the court and of ordinary intelligence would understand them.—Daniel v. Moncure, Mont., 190 Pac. 983.

58. **Limitation of Actions**—Promise in Writing.—Oral promise to pay for past services would not take action on original promise to pay for services out of the operation of the statute of limitations, since such promise, under Code Civ. Proc., § 395, must be in writing.—Frisbie v. Lucas, N. Y., 183 N. Y. Sup. 308.

59. **Malicious Prosecution**—Former Acquittal.—The acquittal of the accused is evidence of want of probable cause, from which fact malice may be inferred.—Herr v. Lollar, Pa., 110 Atl. 742.

60. **Master and Servant**—Master's Care.—The duty of the master to exercise care in the selection of fellow servants extends only to the selection of such as possess the qualifications, mental, moral and physical which will enable them to perform their duties without exposing their co-employes to greater dangers than the work necessarily entails.—Hines, Director General of Railroads, et al. v. Cole, Miss., 85 So. 199.

61.——Respondeat Superior.—A chauffeur, directed by his employer to take employer's brother out during an evening and drive where

directed by brother, was engaged in the performance of duty for employer in so doing, and did not, during such evening, cease to be employer's servant and become the servant of the brother—Shevlin v. Schneider, N. Y., 183 N. Y. Sup. 178.

62. **Money Received**—Estoppel.—There can be no substitute, either on the theory of fraud, estoppel, or otherwise, in action for money had and received, for proof that money was actually received by defendant, or its agent, to the use and benefit of plaintiffs; so there can be no recovery where it appears defendant so received no money which had not been paid to plaintiffs before commencement of the action.—Brooks v. Peoples Bank, N. Y., 183 N. Y. Sup. 243.

63. **Mortgages**—Consideration.—Agreement of mortgagee's agent, extending time for payment of interest and taxes, would not bind mortgagee, being without consideration.—Flannery v. 15 West Forty-fourth Street Co., N. Y., 183 N. Y. 228.

64. **Negligence**—Turn Table Doctrine.—The "turn table doctrine" requires the owner of premises not to attract or lure children into unsuspected danger or great bodily harm, by keeping thereon attractive machinery or dangerous instrumentalities in an exposed and unguarded condition, and where injuries have been received by a child so enticed the entry is not regarded as unlawful, and does not necessarily preclude a recovery of damages; the attractiveness of the machine or structure amounting to an implied invitation to enter.—Heller v. New York, N. H. & H. R. Co., U. S. C. C. A., 265 Fed. 192.

65. **Party Walls**—Mutual Consent.—Either owner of a party wall may, without the consent of the other and at his own expense, carry the party wall higher, provided the existing party wall be not impaired thereby, and such addition thereto be so made and constructed that it may be used as a party wall by both owners.—Herrman v. Hartwood Holding Co., N. Y., 183 N. Y. Sup. 402.

66. **Perpetuities**—Rule Against.—An interest is not obnoxious to the rule against perpetuities, if it begins within lives in being and 21 years, although it may end beyond them.—Hazen v. American Security & Trust Co., D. C., 265 Fed. 447.

67. **Principal and Agent**—Disclosed Principal.—An agent should not be sued when there is a disclosed principal known as such at the inception of the transaction.—United States Nat. Bank of Portland v. Union Nat. Bank of Philadelphia, Pa., 110 Atl. 792.

68.——Scope of Agency.—Where a principal employs an agent with limited power, the agent cannot bind his principal by an agreement beyond the scope of his authority; and persons dealing with the agent must know the agent's powers, and cannot, in the absence of elements of estoppel, hold the principal on such agreement.—Philip Gruner Lumber Co. v. Algonquin Lumber Co., Miss., 85 So. 191.

69.——Undisclosed Principal.—Where a negotiable note is executed unqualifiedly, recovery thereon cannot be had against an undisclosed principal, but such recovery may be had where the note is not negotiable.—Hutchison v. Holland, Cal., 190 Pac. 1072.

70. **Principal and Surety**—Consideration.—The surrender by a surety company of an indemnity bond executed to it by third persons on its becoming surety for a state officer is a valid and sufficient consideration for a new bond given in its place, although not all the makers were signers of the one surrendered.—Title Guaranty & Surety Co. v. Hannon, U. S. C. C. A., 265 Fed. 116.

71. **Reformation of Instruments.**—The equitable remedy by way of reformation of written instruments, where there has been mutual mistake, or mistake on one side and fraud on the other, is one which admits of full and complete relief, and extends even to the insertion of names in an agreement, where all the parties interested are before the court and no rights of innocent persons are affected.—Portugal v. Reisman, N. Y., 183 N. Y. Sup. 190.

72. **Sales**—Option.—Where defendants, copartners, gave plaintiff an option to purchase property within a stipulated time, the option amounted at least to an offer, and a declaration, alleging acceptance before withdrawal, is not open to attack on the ground that the option was unsupported by consideration.—Delaware Sales & Brokerage Co. v. Haydock, Dela., 110 Atl. 668.

73.——Payment by Check.—Whatever the agreement of the parties to a sale as to a cash payment had been, the buyer's check, when accepted, superseded such negotiations, and was payment until dishonored.—Montana Live Stock & Loan Co. v. Stewart, Mont., 190 Pac. 985.

74. **Taxation**—Double Taxation.—If the capital stock of a corporation is taxed, the shares themselves cannot also be taxed, nor can stock in another corporation represented by the stock in the former corporation be taxed.—Commonwealth v. Shenango Furnace Co., Pa., 110 Atl. 721.

75. **Trade-Marks and Trade-Names**—Unfair Competition.—The essence of "unfair competition" consists in the sale of the goods of one manufacturer or vendor as those of another, and if ordinary attention by the purchaser would enable him at once to discriminate the one from the other, equity will not interfere.—Handel Co. v. Jefferson Glass Co., U. S. D. C., 265 Fed. 286.

76. **Trusts**—Commingling.—Where a person handling money of another mingles the same with his own money and places it in a bank, a transfer of the deposit as collateral to secure an antecedent indebtedness does not take away from the beneficiary of the trust the right to follow the money and recover; such transfer being without consideration.—Hungerford v. Curtis, R. I., 110 Atl. 650.

77.——Dual Capacity.—Though a will named the same person as executor and trustee, the duties appertaining to each office were not blended thereby.—Strite v. Wolf, Pa., 110 Atl. 753.

78. **Sales**—Bailment.—Where plaintiff ordered suits from defendant, and, to enable defendant to use a certain class of lining on these goods, agreed to sell and defendant agreed to buy linings, the transaction was a sale instead of a bailment.—Brenner v. Greenberg & Greenberg, N. Y., 183 N. Y. Sup. 22.

79.——Right of Rejection.—It is the duty of a buyer to promptly examine goods, to see whether they comply with his order, and to give notice of rejection if they are defective; but he has a reasonable time for such acts.—Gladstein v. Manhattan Swiss Embroidery Co., N. Y., 183 N. Y. Sup. 16.

80. **Vendor and Purchaser**—Possession as Notice.—That a tenant is in possession of the leased premises constitutes notice to any purchaser of any rights under which he claims.—Adelson v. Sacred Associates Realty Corporation, N. Y., 183 N. Y. Sup. 265.

81. **Wills**—Construction.—Where the testator has used a word in a particular sense, the court, in construing a will, must give such word the meaning so given it by testator wherever the word occurs in the will.—United States Trust Co. of New York v. Perry, N. Y., 183 N. Y. Sup. 426.

82. **Witnesses**—Incrimination.—Where it is not so perfectly evident and manifest that the answer called for cannot incriminate as to preclude all reasonable doubt and fair argument, the privilege must be recognized and protected.—Woolson Spice Co. v. Columbia Trust Co., N. Y., 183 N. Y. Sup. 400.